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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Jonathan C. Bertanelli,) No. CV-11-1346-PHX-PGR (LOA)
10 Plaintiff,) **ORDER**
11 vs.)
12 Charles L. Ryan, et al.,)
13 Defendants.)
14

15 This matter is before the Court on Plaintiff's Motion for Leave to File First
16 Amended Complaint, doc. 36. Defendants oppose the motion, doc. 40. Plaintiff has also filed
17 a related motion in Opposition to Court's Anticipated Pre-Screening Order Dismissing Doe
18 Defendants, doc. 39.

19 **I. Governing Law**

20 This matter arises on Plaintiff's Motion to File a First Amended Complaint, doc. 15.
21 Under Federal Rule of Civil Procedure 15(a), a party may amend a complaint once as a matter
22 of course within 21 days of service, or if a responsive pleading is required, within 21 days of
23 service of the responsive pleading or a motion under Rule 12(b), (e), or (f). In view of the
24 procedural posture of this case, Plaintiff does not need leave to file an Amended Complaint.
25 However, because Plaintiff has filed a motion seeking leave, the Court will grant his motion.

26 Because Plaintiff "seeks redress from a governmental entity or officer or employees
27 of a governmental entity," the Court must screen the complaint pursuant to 28 U.S.C. §
28 1915A(a). The court must dismiss any portion of the complaint that "is frivolous, malicious,

or fails to state a claim upon which relief must be granted. . . .” § 1915A(b)(1). A pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). While Rule 8 does not demand detailed factual allegations, “it demands more than unadorned, the-defendant-unlawfully harmed -me accusations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. Thus, although a plaintiff’s specific factual allegations may be consistent with a constitutional claim, a court must assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.* at 681. The Ninth Circuit has instructed that courts must “continue to construe *pro se* filing liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). The Court screened the original complaint under 28 U.S.C. § 1915. (Doc. 5) The First Amended Complaint is substantially similar to the original complaint.

II. Analysis

A. Count I

Plaintiff seeks to amend Count I to add additional facts to the policy claim asserted in Count I of the original complaint. (compare docs. 1, 36) The Court previously screened Plaintiff’s original complaint pursuant to 28 U.S.C. § 1915A(a) and dismissed the claim in Count I, alleging that Defendant Ryan has a policy of prohibiting protective segregation inmates from seeking protection from other inmates in the same unit because it is identical to Plaintiff’s claim in Count III of CV-11-1340-PHX-PGR (LOA). (Doc. 5 at 3) In so doing, the Court explained that a litigant “‘has no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant[s].’” (Doc. 5

1 at 3) (quoting *Oliney v. Garnder*, 771 F.2d 856, 859 (5th Cir. 1985) (citation omitted). In the
2 proposed amended complaint, Plaintiff re-urges his policy claim and adds several facts.
3 Plaintiff's minor retooling of Count I does not change the nature of that claim or the fact that
4 it is duplicative. Thus, although Plaintiff may file an Amended Complaint, doing so does not
5 revive previously dismissed Count I of the First Amended Complaint. *See Vanderburgh v.*
6 *Hendrix*, 2009 WL 472360, at * 4 (E.D. Cal. Dec. 3, 2009) (dismissing claims as part of
7 screening order pursuant to 28 U.S.C. § 1915 and noting that plaintiff should not reassert the
8 dismissed claims in an amended complaint unless he alleges facts that cure the deficiencies).

9 **B. Count II**

10 In Count II of the original complaint, Plaintiff asserts a violation of his equal
11 protection rights based on his allegations that Defendants Abelowiz, Hartsuck, and Does II and
12 III ignored Plaintiff's requests that they add to Plaintiff's Do Not House With list the names of
13 four inmates who assaulted Plaintiff. Plaintiff alleges that Defendants "were fully aware when
14 they deliberately refused to add [the inmates] to Plaintiff" [list that] they were intentionally
15 denying Plaintiff required departmental PS protection." Plaintiff claims that, as a result of the
16 omission, he was again assaulted by one of the inmates. In the September 7, 2011 screening
17 order, the Court dismissed Count II, without prejudice, for failure to state a claim because
18 Plaintiff "failed to allege that he was treated differently than other similarly situated individuals
19 and that there was no rationale basis for treating him differently." (Doc. 5 at 4) The allegations
20 in Count II of the first amended complaint do not create the deficiencies noted in the screening
21 order.

22 Thus, although Plaintiff may file an Amended Complaint, doing so does not revive
23 previously dismissed Count II of the Complaint because Plaintiff has not cured the defects noted
24 in the Court's September 12, 2011 Order. (Doc. 5); *See Vanderburgh*, 2009 WL 472360, at *
25 4.

26 **C. Claim to Which an Answer will be Required**

27 As the Court previously found, liberally construed, Plaintiff adequately states an
28 Eighth Amendment failure-to-protect claim against Defendants Abelowiz, Hartsuck, Doe II, and

1 Doe III and those Defendants must answer Count I of the First Amended Complaint. Again, the
2 Court will not dismiss Doe II or III, but will not order service on Doe II or III at this time.
3 Rather, Plaintiff may seek leave to amend his Complaint to name those defendants if he
4 discovers their identity. *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (citation
5 omitted). Plaintiff's First Amended Complaint also attempts to reassert claims against
6 previously dismissed Doe Defendants I, and IV through X. Plaintiff has not cured the
7 deficiencies noted in the September 12, 2011 screening order, doc. 5. Thus, Plaintiff's claims
8 against Does I, and IV through X are not revived. *See Vanderburgh*, 2009 WL 472360, at * 4.

9 Accordingly,

10 **IT IS ORDERED** that Plaintiff's Motion for Leave to File a First Amended
11 Complaint, doc. 36, is **GRANTED**.

12 **IT IS FURTHER ORDERED** that Clerk of Court is directed to filed the First
13 Amended Complaint attached to Plaintiff's Motion for Leave to File a First Amended
14 Complaint, doc. 36 - attachment.

15 **IT IS FURTHER ORDERED** that Defendants Abelowiz, Hartsuck, Doe II, and
16 Doe III and must answer Plaintiff's Eighth Amendment failure-to-protect claim asserted in
17 Count I of the First Amended Complaint.

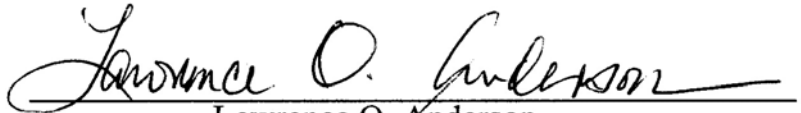
18 **IT IS FURTHER ORDERED** that, in view of Plaintiff's failure to cure the defects
19 noted in the Court's September 12, 2011 Order, doc. 5, the policy claim asserted in Count I and
20 the Equal Protection claim asserted in Count II are not revived and remain dismissed.

21 **IT IS FURTHER ORDERED** that, in view of Plaintiff's failure to cure the defects
22 noted in the Court's September 12, 2011 Order, doc. 5, Plaintiff's allegations against Doe
23 Defendants I, and IV through X are not revived by the amended complaint and remain
24 dismissed.

25 **IT IS FURTHER ORDERED** that Plaintiff's Motion in Opposition to Court's
26 Anticipated Screening Order, doc. 37, is **DENIED**.

1 **IT IS FURTHER ORDERED** that Defendants' Motion to Dismiss, doc. 34, and
2 Plaintiff's Motion for Order Not to Respond to Motion to Dismiss, doc. 38, are **DENIED** as
3 moot in view of the filing of the First Amended Complaint.

4 DATED this 22nd day of May, 2012.

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7 Lawrence O. Anderson
8 United States Magistrate Judge
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